

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7 Water Management Districts

SPONSOR(S): Porter and Pilon

TIED BILLS: None **IDEN./SIM. BILLS:** SB 244

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|--------|---------|--|
| 1) Agriculture & Natural Resources Subcommittee | | Renner | Blalock |
| 2) Rulemaking Oversight & Repeal Subcommittee | | | |
| 3) State Affairs Committee | | | |

SUMMARY ANALYSIS

Under current law, each of the five water management districts (WMDs) must submit to the Department of Environmental Protection (DEP) for review and approval a priority list and schedule for the establishment of minimum flows and levels (MFLs) for surface watercourses, aquifers, and surface waters within the district. If the existing flow or level of a water body is below or projected within 20 years to fall below established MFLs, then a WMD must implement either a recovery strategy to restore the system to the established MFLs or a prevention strategy to prevent the system from falling below the established MFLs. MFLs are adopted by rule by the WMDs and are subject to administrative challenges.

The bill provides that the priority list and schedule submitted to the DEP by the WMDs also identify any reservations proposed by the WMDs to be established, and identify those listed water bodies that have the potential to be affected by withdrawals in an adjacent WMD for which the DEP's adoption of a reservation or a MFL may be appropriate.

The bill also provides that a WMD must provide the DEP with technical information and staff support for the development of a reservation, minimum flow or level, or recovery or prevention strategy to be adopted by rule by the DEP. A WMD must apply any reservation, minimum flow or level, or recovery or prevention strategy adopted by the DEP by rule without the WMD's adoption by rule of such reservation, minimum flow or level, or recovery or prevention strategy.

In addition, the bill provides that if the geographic area of a resource management activity, study, or project crosses WMD boundaries, the affected WMDs are authorized to designate a single affected district by interagency agreement to conduct all or part of the applicable resource management responsibilities. If funding assistance is provided to a resource management activity, study, or project, the WMD providing the funding must ensure that some or all the benefits accrue to the funding WMD. This provision does not impair any interagency agreement in effect on July 1, 2013.

The bill also provides that cooperative funding programs are not subject to the rulemaking requirements of chapter 120, F.S. However, any portion of an approved program which affects the substantial interests of a party would be subject to the hearing procedures established under section 120.569, F.S.

Lastly, the bill requires all WMDs, not just the Southwest Florida Water Management District, to jointly develop, together with the regional water supply authority, the water supply development component of a regional water supply plan, when the plan deals with or affects public utilities and public water supply for those areas served by a regional water supply authority.

The bill appears to have an indeterminate negative fiscal impact on state government (See Fiscal Analysis Section). The bill has a potentially positive fiscal impact on WMDs who enter into interagency agreements by reducing the duplication of services and promoting streamlining. The bill also appears to have a negative fiscal impact on WMDs by requiring them to provide technical information and staff support to the DEP for the development of a reservation, minimum flow or level, or recovery or prevention strategy.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Minimum Flows and Levels

Current Situation

The Department of Environmental Protection (DEP) and each Water Management District (WMD) are required to establish minimum flows for surface watercourses and minimum levels for ground water and surface waters within the district.¹ “Minimum flow” is the limit at which further water withdrawals from a given watercourse would significantly harm the water resources or ecology of the area.² “Minimum level” is the level of groundwater in an aquifer or the level of a surface water body at which further withdrawals will significantly harm the water resources of the area.³

Section 373.042(2), F.S., requires that each WMD submit annually to the DEP for review and approval a priority list and schedule for the establishment of minimum flows or levels for surface watercourses, aquifers, and surface waters within the WMD. The priority list and schedule must identify those water bodies for which the WMD will voluntarily undertake independent scientific peer review.

A person who will be substantially affected by a proposed minimum flow or minimum level may request that the DEP or the governing board of the WMD submit for independent scientific peer review all of the information and data on which the proposed flow or level is based. The request must be made in writing prior to the flow or level being established and prior to the filing of any petition for administrative hearing related to the flow or level.⁴ The statute provides a process for conducting such review and states that the final report is admissible in evidence in any subsequent administrative challenge to establishing the minimum flow or level.⁵

The DEP has the sole authority to review rules of WMDs to ensure consistency with the DEP’s water resource implementation rule.⁶ This review must begin within 30 days of the adoption or revision of a rule by a WMD.

Effect of Proposed Changes

The bill amends s. 373.042(2), F.S., to provide that the priority list and schedule submitted to the DEP by the WMDs for the establishment of MFLs and reservations also identify:

- Any reservations proposed by the WMD to be established under s. 373.223(4), F.S.;⁷ and
- Those listed water bodies that have the potential to be affected by withdrawals in an adjacent WMD for which the DEP adoption of a reservation or a minimum flow or level may be appropriate.

¹ Section 373.042(1), F.S.

² Section 373.042(1)(a), F.S.

³ Section 373.042(1)(b), F.S.

⁴ Section 373.042(4)(a), F.S.

⁵ Section 373.042(5), F.S. This subsection also requires the Administrative Law Judge to render the order within 120 days after the petition is filed.

⁶ Section 373.114(2), F.S. The Water Resource Implementation Rule is promulgated as Chapter 62-40, F.A.C.

⁷ Section 373.223(4), F.S., provides that the governing board or the DEP, can reserve from use by permit applicants, water in such locations and quantities, and for such seasons of the year, as in its judgment may be required for the protection of fish and wildlife or the public health and safety. These reservations must be subject to periodic review and revision in light of changed conditions. However, all presently existing legal uses of water must be protected so long as such use is not contrary to the public interest.

The bill also provides that a WMD must provide the DEP with technical information and staff support for the development of a reservation, minimum flow or level, or recovery or prevention strategy to be adopted by rule by the DEP. A WMD must apply any reservation, minimum flow or level, or recovery or prevention strategy adopted by the DEP by rule without the WMD's adoption by rule of such reservation, minimum flow or level, or recovery or prevention strategy.

Interagency Agreements

Current Situation

Pursuant to chapter 373, F.S., the state regulates various activities that affect surface waters and wetlands through the Environmental Resource Permit (ERP) program. The program is implemented jointly by the DEP and the five WMDs.⁸ Operating Agreements between DEP and the WMDs outline specific responsibilities to each agency for any given application. Under those agreements, the DEP generally reviews and takes actions on applications involving:

- Solid waste, hazardous waste, domestic waste, and industrial waste facilities;
- Mining;
- Power plants, transmission and communication cables and lines, natural gas and petroleum exploration, production, and distribution lines and facilities;
- Docking facilities and attendant structures and dredging that are not part of a larger plan of residential or commercial development;
- Navigational dredging conducted by governmental entities, except when part of a larger project that a WMD has the responsibility to permit;
- Systems serving only one single-family dwelling unit or residential unit not part of a larger common plan of development;
- Systems located in whole or in part seaward of the coastal construction control line;
- Seaports; and
- Smaller, separate water-related activities not part of a larger plan of development (such as boat ramps, mooring buoys, and artificial reefs).

The WMDs have regulatory authority over reviewing and taking action on all other applications, mostly larger commercial and residential developments. Chapter 373, F.S., also grants the WMDs with the authority to implement the water supply and planning policies of the state, and to issue permits for the consumptive use of water. Each WMD is also responsible for water resource management and development. Section 373.705, F.S., provides that it is the intent of the legislature that WMDs take the lead in identifying and implementing water resource development projects, and be responsible for securing necessary funding for regionally significant water resource development projects. The WMDs are encouraged to implement water resource development projects as expeditiously as possible in areas subject to regional water supply plans. Each WMD governing board is required to include in its annual budget the amount needed for the fiscal year to implement water resource development projects, as prioritized in its regional water supply plans.

Section 373.046(4), F.S., authorizes the DEP and the WMDs to modify their division of responsibilities agreement and to enter into further interagency agreements by rulemaking pursuant to chapter 120, F.S., to provide for greater efficiency and to avoid duplication in the administration of part IV of chapter 373, F.S. (management and storage of surface waters). In developing the interagency agreements, the WMDs and the DEP must take into consideration the technical and fiscal ability of each WMD to implement all or some of the provisions of part IV of chapter 373, F.S.

Section 373.046(6), F.S., provides that when the geographic area of a regulatory activity crosses WMD boundaries, the affected WMDs may designate a single affected WMD by interagency agreement to carry out the WMD's regulatory responsibilities within that geographic area.

⁸ The five water management districts include Northwest Florida WMD, Suwannee River WMD, St. Johns River WMD, Southwest Florida WMD, and South Florida WMD.

WMDs do not have the same statutory authority to enter into similar agreements for non-regulatory resource management activities, studies, or projects. In addition, a WMD may not fund resource management activities in another WMD even if some benefits inure to it from the activities.

Effect of Proposed Changes

The bill creates s. 373.046(7), F.S., providing that when the geographic area of a resource management activity, study, or project crosses WMD boundaries, the affected WMDs are authorized to designate a single affected district by interagency agreement to conduct all or part of the applicable resource management responsibilities, not including those regulatory responsibilities that are subject to s. 373.046(6), F.S., discussed above. Under the bill, if funding assistance is provided to a resource management activity, study, or project, the WMD providing the funding must ensure that some or all the benefits accrue to the funding WMD. The provisions in this new subsection will not impair any interagency agreement in effect on July 1, 2013.

Rules/Cooperative Funding Programs

Current Situation

WMDs have cooperative funding programs in which local governments cost share for projects that create sustainable water resources, provide flood protection, and enhance conservation efforts.⁹ According to emails from the Southwest Florida Water Management District (SWFWMD),¹⁰ these are not regulatory programs, which, by definition, are subject to rulemaking. The SWFWMD also states that if a WMD were required to adopt rules for all of the procedures and policies in a cooperative funding program, it would not be able to adopt and modify the program as necessary or be able to implement the program as efficiently.¹¹

Effect of Proposed Changes

The bill creates s. 373.171(5), F.S., to specify that cooperative funding programs are not subject to the rulemaking requirements of chapter 120, F.S. However, any portion of an approved program that affects the substantial interests of a party would be subject to the administrative hearing provisions under s. 120.569, F.S.¹²

Regional Water Supply Planning

Current Situation

Section 373.709, F.S., requires WMDs to conduct water supply needs assessments. A WMD that determines existing resources will not be sufficient to meet reasonable-beneficial uses for the planning period must prepare a regional water supply plan. The plans must contain:

- A water supply development component;
- A water resource development component;
- A recovery and prevention strategy;
- A funding strategy;
- The impacts on the public interest, costs, natural resources, etc;
- Technical data and information;
- Any MFLs established for the planning area;

⁹ Section 373.0363, F.S., provides for a cooperative funding program in the Southern Water use Caution Area, which is implemented by the SWFWMD. This program is the most robust cooperative funding program, but all WMDs have cooperative funding programs to some degree.

¹⁰ Email on file with staff.

¹¹ Email on file with staff.

¹² A party whose substantial interests are affected by the proposed agency action of a WMD is entitled to a hearing under the basic procedures set out in s. 120.569, F.S.

- The water resources for which future MFLs must be developed.; and
- An analysis of where variances may be used to create water supply development or water resource development projects.

Currently, only the Southwest Florida WMD is required to jointly develop, with the regional water supply authority, the water supply development component of a regional water supply plan where such plan deals with or affects public utilities and public water supply for those areas served by a regional water supply authority.

Effect of Proposed Changes

The bill amends s. 373.709(3), F.S., to require all WMDs to jointly develop, together with the regional water supply authority, the water supply development component of a regional water supply plan that deals with or affects public utilities and public water supply for those areas served by a regional water supply authority.

B. SECTION DIRECTORY:

Section 1. Amends s. 373.042, F.S., relating to minimum flows and levels.

Section 2. Amends s. 373.046, F.S., relating to interagency agreements.

Section 3. Amends s. 373.171, F.S., relating to rules adopted by water management district governing boards.

Section 4. Amends s. 373.709, F.S., relating to regional water supply planning.

Section 5. Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill requires the priority list and schedule that is submitted to the DEP for establishing minimum flows and levels for certain water bodies to also include those water bodies that have the potential to be affected by withdrawals in an adjacent WMD, which may result in the DEP having to adopt additional reservations, minimum flows or levels, and recovery and prevention strategies. This provision in the bill could result in an indeterminate negative fiscal impact on the DEP.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill requires WMDs to provide technical information and staff support to the DEP for the development of a reservation, minimum flow or level, or recovery or prevention strategy for adoption by rule by the DEP. This could result in an indeterminate negative fiscal impact on the WMDs.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill may potentially have a positive fiscal impact on WMDs who enter into interagency agreements by reducing the duplication of services and promoting streamlining.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill authorizes certain reservations, minimum flows and levels, and recovery or prevention strategies adopted by the DEP to be applied by the WMDs without requiring the WMDs to adopt them by rule. The bill also provides that cooperative funding programs are not subject to the rulemaking requirements of chapter 120, F.S. However, a party whose substantial interests are affected by any portion of an approved program would be entitled to seek a hearing under the provisions of s. 120.569, F.S.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.